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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

FLORENCE HAVERLAND,

Plaintiff and Appellant,

v.

LISA BADAL et al.,

Defendants and Respondents.

B219093

(Los Angeles County
Super. Ct. No. SC099929)

APPEAL from an interlocutory judgment of the Superior Court of Los Angeles County, Lisa Hart Cole, Judge. Affirmed.

Ezer & Williamson and Mitchel J. Ezer for Plaintiff and Appellant.

Starre & Cohn and Gary A. Starre for Defendants and Respondents.

Florence Haverland appeals an interlocutory judgment in an action for the partition of real property. The interlocutory judgment determines the parties' ownership interests, orders the partition by sale of the property, and appoints a referee with the authority to hire a real estate broker to sell the property. Haverland does not challenge either the determination of the parties' ownership interests or the order of partition by sale. Instead, she contends the trial court should have directly appointed a real estate broker to sell the property rather than appoint a referee with the authority to hire a real estate broker. We conclude that she has shown no error, that the appeal is frivolous, and that the imposition of a monetary sanction is warranted.

FACTUAL AND PROCEDURAL BACKGROUND

Haverland acquired a one-third interest in a single-family residence located at 1715 Armacost Avenue, Los Angeles, through a will. She filed a complaint in September 2008 for partition by sale of the property and an accounting. Lisa Badal, Howard Hori, and Tsutomu Hori jointly answered the complaint, alleging that they also sought partition by sale of the property and an accounting. Tsutomu Hori later died, and Badal was appointed the administrator of his estate.

Haverland filed a motion in April 2009 for the appointment of a real estate agent to list the property for sale. Badal and Howard Hori opposed the motion and filed a motion in May 2009 for an interlocutory judgment determining the parties' interests in the property and ordering a partition by sale and the appointment of a referee to sell the property.

After a hearing on June 3, 2009, the trial court determined that the parties' ownership interests were not in dispute and that an interlocutory judgment under Code of Civil Procedure section 872.720 was appropriate. The court stated that because the parties disputed the manner of sale and the appropriate sales price, Haverland's motion for the appointment of a real estate agent was denied. The court granted the motion by Badal and Howard Hori and entered an interlocutory judgment on July 20, 2009.

The interlocutory judgment determines the parties' ownership interests, orders a partition by sale, and appoints David J. Pasternak as referee "with authority to sell the property at public auction to the highest bidder for cash . . . or private sale in the event that the referee determines at [his] discretion that a private sale will be the most beneficial with all parties having interest therein." The interlocutory judgment states, "The referee shall coordinate his/her efforts with the administrator of the Estate of TSUTOMU HORI, so as to satisfy the requirements of the administrator's limited powers under the Administration of Estates Act as granted in probate case no. BP115187." It also states that the property is to be sold "as is," for all cash, and that the referee may hire a real estate broker and may pay commissions not to exceed 5 percent.

Haverland timely filed a notice of appeal from the interlocutory judgment on September 17, 2009.¹

¹ An interlocutory judgment in a partition action is appealable. (Code Civ. Proc., § 904.1, subd. (a)(9).)

The referee filed an ex parte application on October 9, 2009, for an order authorizing him to list the property for sale by a real estate broker for \$595,000, “as is,” with any sale to be subject to court confirmation and overbid procedures. The trial court granted the application in an order filed on October 9, 2009. Haverland filed an ex parte application on November 6, 2006, for an order vacating the order of October 9, based on inadequate notice. She also sought an order setting the amount of an undertaking in order to stay the enforcement of that part of the interlocutory judgment ordering the partition by sale (Code Civ. Proc., § 917.4). The referee also filed a renewed ex parte application on November 6, 2006, requesting the same order requested in his previous ex parte application.

At the hearing on November 6, 2006, counsel for Haverland stated that he wished to delay the sale until the real estate market improved rather than proceed to list the property for sale on the terms proposed by the referee, which he characterized as a proposed “fire sale.” The trial court on November 6, 2006, denied the request to vacate the order of October 9, denied the referee’s renewed ex parte application as moot, and fixed the amount of an undertaking at \$10,000.²

Badal, individually and as administrator of the estate of Tsutomu Hori, and Howard Hori jointly filed a motion in this court for a monetary sanction, against Haverland and her counsel, in the amount of \$8,840 for a frivolous appeal taken solely

² We previously granted Haverland’s request for judicial notice of the ex parte application and order filed on October 9, 2009, the two ex parte applications and minute order filed on November 6, 2009, and other documents filed in the trial court. (Evid. Code, § 452, subd. (d).)

for delay. The motion is supported by their attorney's declaration stating that they have incurred, or will incur, that amount of attorney fees in responding to this appeal.

CONTENTION

Haverland contends the trial court should have appointed a real estate broker directly rather than appoint a referee with the authority to hire a real estate broker.

DISCUSSION

1. Standard of Review

Code of Civil Procedure sections 872.010 to 874.240 govern actions for the partition of real and personal property. Section 873.010, subdivision (a) states that in such an action, "The court shall appoint a referee to divide or sell the property as ordered by the court." Despite the use of the word "shall," a referee is required under the statute only if the trial court determines that a referee is necessary or appropriate in the circumstances. (*Richmond v. Dofflemyer* (1980) 105 Cal.App.3d 745, 755.) Thus, the decision whether to appoint a referee in a partition action is committed to the trial court's discretion. Accordingly, our review is for abuse of discretion.

An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

Haverland argues that the appropriate standard of review is de novo. She quotes language from *McGhan Medical Corp. v. Superior Court* (1992) 11 Cal.App.4th 804 stating that de novo review is appropriate if " "the concerns of judicial

administration . . . favor the appellate court” ’ ” because the decision “requires the ‘exercise [of] judgment about the values that animate legal principles,’ ” and the decision “is one not necessarily made better by a trial court judge than by an appellate tribunal.” (*Id.* at p. 811.) She does not explain, however, why the decision whether to appoint a referee in these circumstances involves the exercise of judgment about the values that animate legal principles or why the trial court would not be better suited to make the decision. We conclude that the trial court is better suited to decide whether the appointment of a referee is appropriate in these circumstances and that concerns of judicial administration do not favor the appellate court making the decision de novo.

2. *The Appointment of a Referee Was Proper*

Haverland argues that the appointment of a referee has added an unnecessary expense to the sale of the property and has unnecessarily complicated the sale process. Her primary concern, however, appears to be that the sale should not go forward in a depressed real estate market on all-cash terms. She explains in her opening brief on appeal, “The purpose of this appeal, filed on September 17, 2009 was (and still is) to delay the Referee’s ‘fire sale’ of the Property until the then (and to a lesser extent still) dire condition of the real estate market improves.” She seeks to accomplish this by having the property listed for sale directly through “an independent real estate broker given time to explore alternatives, as opposed to an all cash auction in a down market.” She argues further that her views on how to market the property should prevail because she has paid the costs of maintaining the property and, “He who pays the piper calls the tune.”

Haverland makes no effort to show either legal error or a prejudicial abuse of discretion. Her mere disagreement with the trial court's decision is not grounds for reversal.

We conclude that the decision to appoint a referee was reasonable. The appointment of a referee can provide substantial benefits to the court and the parties. A referee can make recommendations to the court concerning the manner, terms, and conditions of sale, including whether to conduct a public auction or private sale. (Code Civ. Proc., §§ 873.520, 873.610, subd. (b).) The referee must provide notice of the sale in the same manner required for notice of sale by execution. (*Id.*, § 873.640.) The referee also must provide a detailed report to the court after the sale and prior to the court's confirmation of the sale. (*Id.*, § 873.710.) At the hearing to confirm the sale, the court may either confirm the sale or vacate the sale if certain findings are made, or the court may vacate the sale and accept an increased offer by a responsible bidder at the hearing. (*Id.*, § 873.730, 873.740.) The trial court reasonably concluded that these and other benefits of the appointment outweighed the costs.

3. *The Appeal Is Frivolous and Was Taken Solely for Delay, and a Monetary Sanction Is Warranted*

An appellate court may award attorney fees incurred on appeal as a monetary sanction against the appellant if "it appears to the reviewing court that the appeal was frivolous or taken solely for delay." (Code Civ. Proc., § 907; see Cal. Rules of Court, rule 8.276(a).) An appeal is frivolous if "any reasonable attorney would agree that the

appeal is totally and completely without merit.” (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.)

We conclude that any reasonable attorney would agree that Haverland’s disagreement with the trial court’s decision to appoint a referee in these circumstances is not grounds for reversal and that her appeal seeking de novo review of that decision, without arguing any legal error or abuse of discretion, is totally and completely without merit. Her arguments against the appointment of a referee do not come close to establishing an abuse of discretion and are indisputably without merit. Moreover, she cites no authority supporting de novo review of the decision and offers no colorable argument for de novo review.

Statements made in Haverland’s opening and reply briefs on appeal suggest that this appeal was taken solely to delay the sale of the property in the hopes that the market value would increase. She stated in her opening brief, “The purpose of this appeal, filed on September 17, 2009, was (and still is) to delay the Referee’s ‘fire sale’ of the Property until the then (and to a lesser extent still) dire condition of the real estate market improves.” She stated in her reply brief, “Putting the Property on the market late last year, when Los Angeles real estate was near or at the bottom, was (to put it charitably) unwise, but the worst was averted by this appeal.”

We do not doubt that these statements were not intended to be admissions that the appeal was taken solely for delay, and the first statement could be construed differently. Haverland opposed the appointment of a referee in the trial court largely because she believed that a real estate broker hired directly by the court might wait for

property values to increase before selling the property. She seeks to achieve that same result on appeal through a reversal of the order appointing a referee with directions to the trial court to appoint a real estate broker instead. Thus, the stated purpose of the appeal could be to delay the sale through her success on the merits. The second statement, however, suggests that the appeal had already achieved some of the desired result—delay—months before the filing of this opinion, and therefore is more difficult to explain away. Moreover, the frivolousness of her argument on appeal suggests that delay was the motive, rather than a good faith belief in the validity of the appeal. (*In re Marriage of Flaherty*, *supra*, 31 Cal.3d at p. 649; *Town of Woodside v. Gava* (1989) 213 Cal.App.3d 488, 494.) On balance, we conclude that the appeal is frivolous and was taken solely for delay.

A monetary sanction against Haverland and her counsel is warranted in the amount of respondents' attorney fees incurred on appeal, \$8,840, payable to respondents.

DISPOSITION

The interlocutory judgment is affirmed. The motion for a monetary sanction is granted. Haverland and her counsel, jointly and severally, are ordered to pay respondents \$8,840 within 30 days after the issuance of our remittitur. The clerk of this court is ordered to send a copy of this opinion to the State Bar of California upon the issuance of our remittitur (Bus. & Prof. Code, § 6086.7, subd. (a)(3)), and counsel for Haverland is ordered to send a copy of this opinion to the State Bar within 30 days after the issuance of our remittitur (*id.*, § 6068, subd. (o)(3)). Respondents are entitled to recover their costs on appeal.

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CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.